BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of	)	MB Docket No. 16-41
Diverse and Independent Sources	)	
of Video Programming	)	

COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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January 26, 2017

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Comcast Corporation ("Comcast") and NBCUniversal Media, LLC ("NBCUniversal") hereby respond to the above-captioned Notice of Proposed Rulemaking.[1] Since 1992, competition in the video marketplace has grown at a remarkable rate, and in the past few years has exploded with nearly every consumer in America having access to at least three (and often more) facilities-based multichannel video providers ("MVPDs") and many more online video distributors ("OVDs"). The Commission has recognized that the video marketplace is increasingly robust and competitive and that these developments have obviated the need for many of the regulations enacted in the 1992 Cable Act.[2] Yet, in the face of these marketplace

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[1] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd. 11352 (2016) ("NPRM").

[2] *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 ¶ 6 (2015) (adopting a rebuttable presumption that cable operators are subject to "Competing Provider Effective Competition" and prohibiting franchising authorities from regulating basic cable rates absent a contrary showing, based on the Commission's finding that "such an approach is warranted by market changes" in the last 20 years and the "current state of competition in the MVPD marketplace"), *appeal docketed sub nom. Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, No. 15-1295 (D.C. Cir. Aug. 28, 2015); *Revision of the Commission's Program Access Rules, et al.*, Report and Order, 27 FCC Rcd. 12605 ¶¶ 1-2 (2012) (ending the prohibition on exclusive contracts between cable operators and cable-affiliated programmers, finding the prohibition is "no longer necessary to preserve and protect competition and diversity in the distribution of video programming" (internal quotation marks omitted)). The Commission's annual video competition reports provide ample evidence of this increased competition. *Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, DA 17-71, ¶¶ 53-66 (rel. Jan. 17, 2017) ("*Eighteenth Video Competition Report*") (discussing the multiple MVPD business models and competitive strategies that have developed in response to increased competition from OVDs); *Annual Assessment of the Status of Competition in the Market for the Delivery*

facts, the NPRM asks whether the Commission can and should impose new regulations on carriage negotiations between MVPDs and video programmers. The answer is clear on both counts: "No." The Commission should recognize that the video marketplace is competitive and diverse at all levels, decline to adopt the proposed rules, and terminate this proceeding.

I. INTRODUCTION AND SUMMARY

Not long into 2016, the Commission commenced an inquiry into the state of independent and diverse programming, with particular attention to online video. The record of that inquiry included the usual mixture of grievances and unsupported assertions, but it also included overwhelming evidence that the video marketplace is vibrant and competitive. More importantly, the realities that have occurred and are occurring out in the marketplace, just in the past several months, present an unmistakably clear picture: Programming of every genre, niche, source, and viewpoint continues to increase by leaps and bounds, new online platforms are launching one after another (some that look a lot like traditional distributors or networks, and others that appear to be new things altogether), and consumers are enjoying the bounty of a video programming marketplace more robust, dynamic, and diverse than it has ever been. These incredibly healthy marketplace developments did not dissuade the prior Commission, however, from issuing an NPRM that proposes to adopt new and wholly unwarranted regulations restricting MVPDs' ability to enter into "most favored nation" ("MFN") and "alternative

of Video Programming, Seventeenth Report, 31 FCC Rcd. 4472 ¶¶ 2, 9-11, 130-209 (2016) ("*Seventeenth Video Competition Report*") (devoting more than eighty paragraphs of discussion to OVDs, and praising the "progress of the online video industry," which "continues to evolve" and "expand[] the amount of video content available to consumers through original programming and new licensing agreements with traditional content creators"), *and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253 ¶ 22 (2015) ("*Sixteenth Video Competition Report*") (noting that "[h]istorically, cable companies rarely competed with one another in the same geographic area," but today, some geographic areas "have as many as five MVPDs . . . directly competing with one another in the delivery of video programming"), *with Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 (1994) ("*First Video Competition Report*").

distribution method" ("ADM") provisions (and even asks whether it should regulate programmers' wholesale bundling practices).

The questions posed by the NPRM are readily answered. Is there a problem evident in today's marketplace? No; far from it; not even close. Even assuming, contrary to powerful marketplace evidence, that there were a hypothetical constraint on the flow of programming to consumers due somehow to certain MFNs and ADMs, does the Commission have any legal authority to regulate these provisions? Plainly, no; and even if it did, it would be flexing such authority at the serious risk of creating numerous negative unintended consequences, including likely violating the Constitution and *diminishing* the carriage opportunities of independent and diverse programming. This would be bad policy and bad law. So, rather than regulate like it's 1999 – or, perhaps more aptly, 1992 – it is time for the Commission in this new year to forget old acquaintance with the shopworn regulatory tools of an obsolete era and resolve to leave things alone that are *thriving* on their own.

II. THE VIDEO MARKETPLACE IS THRIVING AND IS IN NO NEED OF GOVERNMENT INTERVENTION.

Consumers today enjoy vastly more video programming – and much more diverse and independent programming – on a wider array of platforms than at any point in history. This abundance of choice for consumers is a direct result of the explosion of distribution opportunities over the past decade brought about by innovations in both the MVPD and online video marketplaces. As the NPRM rightly recognizes, the video marketplace "is in the midst of major changes that are transforming how Americans access and consume video programming"[3] and is "evolving toward greater competition, diversity, and innovation."[4] Yet the NPRM proceeds to

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[3] NPRM ¶ 5.

[4] *Id.*

turn a blind eye to these many "pro-consumer trends" and inexplicably concludes that heavy-handed government intervention is necessary to "promote competition, programming diversity, and innovation."[5] However, an objective look at the video programming landscape shows a competitive and evolving marketplace, spurred on by decades of successful private negotiations and investment. This evolution should be allowed to continue unabated.

A. Diverse And Independent Programmers' Distribution Opportunities Have Grown Dramatically Over The Past Two Decades Thanks To MVPD Innovation And The Explosion Of Online Platforms

It is indisputable that independent and diverse content providers have more opportunities to reach consumers than ever before. A few decades ago, the only option for content creators seeking national audiences was carriage on one of the three major broadcast networks. The evolution of the cable television marketplace in the 1970s and 1980s offered incrementally more avenues to living rooms, but such options were limited by channel capacity. Since the passage of the 1992 Cable Act, however, cable channel capacity has increased ten-fold,[6] while once-prevalent vertical integration levels have plummeted to all-time lows – from 57 percent in 1992 to barely 9 percent currently.[7] Independent networks have been particularly successful over that time period: in 1992, only a small number of non-affiliated cable networks were among the list of most-watched networks,[8] but today, that dynamic has been flipped on its head, with

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5 *Id.* ¶ 3.

6 Channel capacity has increased from approximately 30 channels to more than 300. *See* Comments of Comcast Corp. and NBCUniversal Media, LLC, MB Docket No. 16-41, at 6-7 nn.10-11 (filed Mar. 30, 2016) ("Comcast NOI Comments"); *First Video Competition Report* ¶ 20 (noting that nearly 97 percent of cable operators had the capacity to provide 30 or more channels).

7 *See* Comments of NCTA, MB Docket No. 16-247, at 12-13 (filed Sept. 21, 2016). In 1992, 57 percent of national cable networks – 39 of only 68 – were affiliated with a cable operator. *See* H.R. Rep. No. 102-628, at 41 (1992).

8 *See First Video Competition Report* ¶¶ 161-162 (finding 53 percent of programming services integrated with a cable operator, with 12 of the top 15 most-watched services according to prime-time rankings being vertically integrated).

independent networks making up nearly all of the top-rated national cable networks.[9] Multiple competing MVPDs provide independent and diverse programmers many ways to reach their audience; 99 percent of consumers are able to choose from three or more MVPDs, and nearly 18 percent can choose from four or more.[10]

Current competitive dynamics have driven substantial increases in the quality and diversity of programming available to consumers. Broadcast and cable networks, many of which previously relied on repeats and movies, are increasingly investing in high-quality original programming.[11] While cable drove much of the growth that led to a record-setting numbers of original, scripted series on TV in 2016 – cable networks offered nearly *five times* more original series in 2016 than in 2002 – OVDs have also played an important and expanding role.[12] For example, OVDs offered 49 original series in the first half of 2016 alone, up from just four in 2010.[13] Netflix has promised to produce 1,000 hours of original programming next year, after

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[9] Of the top 20 national cable networks (by either average 24-hour or prime-time ratings), 19 are unaffiliated with a top-five cable operator, with USA Network (affiliated with Comcast) as the only affiliated network to make the top 20. SNL Kagan, *TV Network Summary*, https://www.snl.com/interactivex/tv_NetworksSummary.aspx (last visited Dec. 7, 2016) (using ratings from 2015); *see also Seventeenth Video Competition Report*, App. B, tbl. B-1 (listing national video programming services affiliated with one or more MVPDs).

[10] *See Eighteenth Video Competition Report* ¶ 21 & tbl. III.A.2. The percentage of homes with access to four or more MVPDs fell significantly – from 38.1 percent in 2014 to 17.9 percent in 2015 – as a result of the acquisition of DirecTV by AT&T. *Id.* ¶ 21.

[11] *See* Comcast NOI Comments at 8-9.

[12] *See* Lesley Goldberg, *Scripted Originals Hit Record 455 in 2016, FX Study Finds*, Hollywood Reporter, Dec. 21, 2016, http://www.hollywoodreporter.com/live-feed/scripted-originals-hit-record-455-2016-fx-study-finds-958337. In total, there were a record 455 scripted series across broadcast networks, cable networks, and OVD services in 2016, a *137 percent increase* from the 192 such series ten years earlier (and 71 percent increase over the 266 shows just five years ago). *See id.*

[13] Drew Harwell, *America Has Never Had So Much TV, And Even Hollywood Is Overwhelmed*, Wash. Post, Nov. 7, 2016, https://www.washingtonpost.com/news/the-switch/wp/2016/11/07/america-has-never-had-so-much-tv-and-even-hollywood-is-overwhelmed/. Original programming has taken off so much that it has become the most popular content, not only on Netflix, but also on HBO Now. Brian Bacon, *Original programming tops movies on HBO NOW*, SNL Kagan, Dec. 29, 2016, https://www.snl.com/InteractiveX/article.aspx?ID=38869621&KPLT=4.

creating 600 hours in 2016,[14] and this investment trend is widely expected to continue.[15] These developments present untold opportunities for diverse and independent voices to be heard. As Lionsgate Television's President Sandra Stern observed, "[t]he proliferation of television has opened the doors to talent who were not working in TV five years ago."[16]

Beyond simply producing a greater quantity of high-quality programming, OVDs also have had "a critical, but too-often-neglected effect" of facilitating "the democratization of content creation" by "remov[ing] barriers – strategic, economic, and national – to the distribution of video content."[17] Direct-to-consumer online services like Google's YouTube allow content creators unfettered access to virtually endless audiences.[18] The more than 500 OVDs worldwide not only provide consumers with access to the previously unavailable content they want, but also

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[14] Drew Harwell, *America Has Never Had So Much TV, And Even Hollywood Is Overwhelmed*, Wash. Post, Nov. 7, 2016, https://www.washingtonpost.com/news/the-switch/wp/2016/11/07/america-has-never-had-so-much-tv-and-even-hollywood-is-overwhelmed/.

[15] *NATPE Survey Foresees Upswing in Scripted TV, Decrease in Production Budgets*, NAPTE, Nov. 3, 2015, https://www.natpe.com/blog/natpe-survey-foresees-upswing-in-scripted-tv-decrease-in-production-budgets/ (finding that "[m]ore than half of [NATPE] members polled (54%) believe that the number of scripted shows will increase over the next two years").

[16] Jon Erlichman, *The 'Golden Age of TV' Has A Lot of People Worried – Here's Why*, Fortune, Jan. 18, 2016, http://fortune.com/2016/01/18/golden-age-tv-peak/.

[17] Boston Consulting Group, *The Future of Television*, at 4, 23 (Sept. 2016), https://www.bcgperspectives.com/Images/BCG-Future-of-Television-Sep-2016_tcm80-213956.pdf ("BCG OTT Report"); *see also id.* at 18 ("OTT has been a critical source of th[e] increase [in the amount of content, the number of content creators, and the market value of content] – not only as a buyer of content but also as a globalizing force that provides content creators with access to new markets and as a technology that eliminates traditional barriers to distribution and facilitates access of content creators to consumers and consumers to content creators."); *Section 257 Triennial Report to Congress*, Report, 31 FCC Rcd. 12037 ¶ 24 (2016) ("[T]he barriers to entry (colloquially speaking) to production and distribution of audiovisual products have dropped substantially and there has been a concomitant massive increase in production. So-called 'user-generated content,' or 'UGC' is ubiquitous (on YouTube, for example), and, a growing number of individuals and small entities are able to monetize their UGC via advertising sales. In some cases, video content that begins as short-form episodes posted on a website can evolve into commercially-supported and distributed programming.").

[18] YouTube has over a billion users who generate billions of views per day. YouTube, *Statistics*, https://www.youtube.com/yt/press/statistics.html (last visited Dec. 12, 2016); *see also* BCG OTT Report at 14 ("OTT has unconstrained space for many more voice, opinions, and events, superserving far more niche audiences and interests."); *id.* at 11 ("Almost every video producer or storyteller—essentially anyone with a high-speed mobile or internet connection—now has access to billions of potential viewers, including more than 75% of the EU population and 90% of the US population.").

"provide[] audiences for all kinds of content creators."[19] Issa Rae's success illustrates this phenomenon. After her show "The Misadventures of Awkward Black Girl" garnered over 20 million views on YouTube, Rae inked a deal with HBO for "Insecure" (which premiered in October 2016 and earned Rae a 2017 Golden Globes nomination for Best Actress in a TV Series, Musical or Comedy[20]) and closed a first-look producing deal with the network, under which Rae will develop programming focused on diverse voices.[21]

The absence of barriers in the online world means that content that once would have been considered "niche" can find an audience and benefit from access to worldwide distribution platforms. While the NPRM is focused on *networks'* carriage opportunities, independent content creators have the ability to *bypass* traditional program networks and MVPD carriage altogether via the Internet. The Commission should recognize the key distinction between creating valuable content and having a business that aggregates that content into a linear "network." Pivot Network, for example, recently decided to shutter its cable network in favor of focusing on

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[19] BCG OTT Report at 4, 11. "[N]iche sports are beginning to thrive online because they can tap into pent-up demand from fans who, in the past, had no access to niche sports in the traditional TV lineup. For example, there are 7.6 million US lacrosse fans whose interests are being served by Lax Sports Network." *Id.* at 23; *see also* Samantha Schnurr & Sarah Glover, *Golden Globes Celebrates Diversity in 2017: Globes 'Is Woke,'* NBC Washington, Jan. 9, 2017, http://www.nbcwashington.com/news/national-international/2017_Golden_Globes_Celebrates_Diversity_Viola_Davis-406081336.html ("In the age of the ongoing television renaissance, actors are not limited to one particular kind of medium to tell a story – there's network television, cable television and online television. While it took a bit to adapt to the idea of TV on the Internet, it has evolved to not only exist, but excel and the proof is in several of this year's [Golden Globes] honorees who got their start on the World Wide Web. Both Rachel Bloom and Issa Rae rose to fame initially on YouTube, where they created and starred in their own content. Now, they're both Golden Globe nominees with successful series shaped by distinct--and at times underrepresented – voices.").

[20] Meher Tatna, *Issa Rae, Insecure – Nominee, Best Performance by an Actress in a TV Series – Musical or Comedy*, Golden Globe Awards, Jan. 6, 2017, http://www.goldenglobes.com/articles/issa-rae-insecure-nominee-best-performance-actress-tv-series-%E2%80%93-musical-or-comedy.

[21] *See* Nellie Andreeva, *Issa Rae Inks First-Look Deal with HBO*, Deadline, Aug. 30, 2016, http://deadline.com/2016/08/issa-rae-first-look-deal-hbo-1201810975/; Greg Braxton, *Issa Rae Takes HBO from White 'Girls' to Black Women with 'Insecure,'* L.A. Times, July 30, 2016, http://www.latimes.com/entertainment/tv/la-et-st-hbo-insecure-20160730-snap-story.html.

the production of content.[22] Even content creators who never worked with traditional distribution outlets are able to realize significant value from their efforts: Swedish producer PewDiePie has nearly *14 billion* views and more than 50 million subscribers on YouTube, earning an estimated $15 million last year alone.[23] Furthermore, Louis C.K.'s OTT-only show "Horace and Pete," which was sold directly to consumers on Louis C.K.'s website, was ranked as the tenth best show of 2016 by TV critic David Bianculli.[24] The NPRM's singular focus on the aggregation of content on networks and the carriage of these networks by MVPDs is anachronistic.[25] There is zero marketplace evidence of a diminished, or diminishing, supply of diverse or independent programming, because there simply are no distribution gatekeepers or bottlenecks preventing diverse and independent content creators from reaching consumers.

B. OVDs Are Creating and Obtaining Access To, And Then Delivering To Consumers, A Significant And Growing Amount Of Content – Including Content That First Airs On Broadcast And Cable TV Networks.

The NPRM's proposal to prohibit certain contractual provisions is premised on the theory that OVDs face barriers to entry and growth due to limitations on their ability to license

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22 Derek Lawrence, *TV Network Pivot to Shut Down*, Entertainment Weekly, Aug. 17, 2016, http://www.ew.com/article/2016/08/17/tv-network-pivot-shut-down.

23 *PewDiePie: About*, YouTube, https://www.youtube.com/user/PewDiePie/about (last visited Dec. 13, 2016); Todd Spangler, *PewDiePie Pulls in $15 Million, Again Topping List of Highest-Paid YouTube Stars*, Variety, Dec. 5, 2016, http://variety.com/2016/digital/news/youtube-pewdiepie-15-million-highest-paid-1201933823/. Similarly, "Tastemade, a food-focused video network that was launched as a channel on YouTube, racks up 700 million views a month, three times the online audience of its traditional professional rival, the Food Network." BCG OTT Report at 24.

24 David Bianculli, *'A Lot Going On': Critic David Bianculli Picks The Best TV Of 2016*, NPR, Dec. 22, 2016, http://www.npr.org/2016/12/22/506473070/a-lot-going-on-critic-david-bianculli-picks-the-best-tv-of-2016; *see* Anthony D'Alessandro, *Louis C.K. On Potential 'Horace And Pete' Season 2: "I Have Ideas On How To Continue The Series,"* Deadline Hollywood, June 16, 2016, http://deadline.com/2016/06/louis-c-k-horace-and-pete-season-2-1201773539/.

25 *See* BCG OTT Report at 11 ("No longer are content creators and aggregators bound by the limited-distribution 'bandwidth' available on a fixed (even if large) number of TV channels delivered over the air or on cable, fiber, or satellite transponders.").

content.[26] This premise is patently wrong – OVDs are freely entering the marketplace, growing rapidly, and accessing a wide variety of content.[27] In fact, hardly a day goes by without the launch of yet another OVD or the announcement of a major content deal with one OVD or another. The time between the NOI and the NPRM, for example, has seen unabated growth.

Following the launch of at least 33 new OVDs in 2015,[28] entry into the OVD marketplace has continued at a breakneck pace in 2016. The month of October 2016 *alone* saw launches, announcements, or content deals involving at least four new OVDs.[29] It is hard to find network

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[26] *See* NPRM ¶¶ 6-7.

[27] The rapid and unrelenting growth of OVDs is undeniable. According to SNL Kagan estimates, an estimated 61 million households, *half* of all U.S. households, regularly watch television or movies online today. *See* Ian Olgeirson, *Online Substitution Pressures Multichannel, Mitigated by Influence of VSP Skinny Packages*, SNL Kagan, Nov. 20, 2015, https://www.snl.com/InteractiveX/article.aspx?ID=34481378. SNL also estimates there could be nearly 110 million aggregate subscriptions to OTT video on-demand services in the U.S. by the end of 2016, producing $8 billion in revenues, and those numbers could potentially grow to nearly 150 million subscriptions and over $13 billion in revenues in 2025. Ali Choukeir, *State of US Online Video: SVOD*, SNL Kagan, Aug. 29, 2016, https://www.snl.com/InteractiveX/article.aspx?Id=37392871. Not only are there more subscribers on OVDs, but those subscribers are watching more content than ever before. For example, Netflix users are on pace to stream 600 hours of content *per subscriber* in 2016, which is nearly double 2011's per-subscriber streaming hours – in other words, the average Netflix subscriber is streaming almost *12 days more* content in 2016 than in 2011. Stephen Lovely, *Subscribers Watch 12 Days More Netflix A Year Than They Did 5 Years Ago*, CordCutting.com, Nov. 10, 2016, http://cordcutting.com/subscribers-watch-12-days-more-netflix-a-year-than-they-did-5-years-ago/.

[28] *See* Ali Choukeir, *Number of US OTT Video Services Erupts in 2015*, SNL Kagan, Nov. 23, 2015, https://www.snl.com/InteractiveX/article.aspx?Id=34510329. This follows 10 or more new launches in each year from 2011 to 2014, after only four such launches in 2010. *Id.*

[29] These include AT&T's "DirecTV Now," Google's anticipated online TV service, Walmart's "Vudu Movies on Us," and the U.S. launch of Russian online video service "Tvsavr." *See* Janko Roettgers, *AT&T CEO: DirecTV Now Streaming Service Will Cost $35 a Month*, Variety, Oct. 25, 2016, http://variety.com/2016/digital/news/att-ceo-directv-now-will-cost-35-a-month-1201900052/; Joe Flint & Shalini Ramachandran, *Google Signs Up CBS for Planned Web TV Service*, Wall St. J., Oct. 19, 2016, http://www.wsj.com/articles/google-signs-up-cbs-for-planned-web-tv-service-1476902412; Sarah Perez, *Walmart Launches a Free Streaming Service, Vudu Movies on Us*, Tech Crunch, Oct. 18, 2016, https://techcrunch.com/2016/10/18/walmart-launches-a-free-streaming-service-vudu-movies-on-us/; Vladimir Kozlov, *Russian Online Video Service Tvzavr to Launch in U.S.*, Hollywood Reporter, Oct. 24, 2016, http://www.hollywoodreporter.com/news/russian-online-video-service-tvzavr-940776. These launches, as well the many others that have occurred since the NOI, employ a diverse array of business models and content libraries. DirecTV Now and Google's anticipated service are live-streaming services seeking to compete with and replace traditional MVPD subscriptions. Advertising-based OVDs like Vudu Movies on Us and "Yahoo View" (launched in August 2016) provide customers free access to VOD content, while programmers continually launch new subscription-based standalone services, such as BET Play (June 2016) and Starz (April 2016), joining the dozens of other similar services. *See* Sarah Perez, *Yahoo Launches a TV-Watching Site, Yahoo View, in Partnership with Hulu*, Tech Crunch, Aug. 8, 2016, https://techcrunch.com/2016/08/08/yahoo-launches-a-tv-watching-site-yahoo-

content that is *not* available online in some form or another. Programmers and MVPDs have met the huge consumer demand for anytime, anywhere access to content both by working in concert with OVDs and competing even more fiercely for eyeballs. Like other content companies, NBCUniversal sells its programming to a multitude of OVDs. Additionally, online "linear" distributors like Sling TV, Sony PlayStation Vue, and DirecTV Now (soon to be joined by Google's and Hulu's anticipated services) offer dozens of networks, including NBCUniversal networks, and programmers' standalone online services provide access to much (and often all) of the same content available through MVPDs. There is no evidence that MVPD contracts are restricting programmers from finding an audience via any of these services.

Notably, OVDs like Netflix and Amazon typically license on an exclusive subscription-VOD basis programming that is first shown on broadcast and cable networks (or in movie theaters), which not only differentiates them from each other but also differentiates them from MVPDs, which typically do not have exclusives.[30] OVDs bargain aggressively for these

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view-in-partnership-with-hulu/; Lizzie Plaugic, *Viacom Launches BET Play Streaming App for $3.99 a Month*, The Verge, June 22, 2016, http://www.theverge.com/2016/6/22/11999784/bet-play-streaming-app-kevin-hart-gabrielle-union; David Lieberman, *Starz Introduces Its $8.99 a Month Standalone Streaming Service with Early Debut for 'Outlander,'* Deadline, Apr. 5, 2016, http://deadline.com/2016/04/starz-introduce-standalone-streaming-service-app-1201732180/. And African-American broadcast network Bounce TV recently launched its own subscription VOD service, "Brown Sugar," featuring a robust library of African-American-themed movies from the 1970s and 1980s, and, according to actress Pam Grier, "is just like Netflix, only blacker." *See* Todd Spangler, *'Like Netflix, Only Blacker': Brown Sugar Blaxploitation-Movie Subscription VOD Service Launches*, Variety, Nov. 17, 2016, http://variety.com/2016/digital/news/blaxploitation-movies-streaming-brown-sugar-1201920554/.

[30] For example, Netflix has exclusive rights to hit shows such as Quantico (ABC), Better Call Saul (AMC), American Crime Story (FX), and dozens of others, as well as an exclusive output deal for Disney movies and cable network content. Alisha Grauso, *Netflix to Begin Exclusive Streaming of Disney, Marvel, Star Wars and Pixar in September*, Forbes, May 24, 2016, http://www.forbes.com/sites/alishagrauso/2016/05/24/netflix-to-begin-exclusive-streaming-of-disney-marvel-star-wars-and-pixar-in-september/#68db5f1e322b. Amazon Prime has exclusive rights to The Americans (FX), Vikings (History Channel), Dr. Who (BBC America), children's shows from PBS Kids, and dozens of others. Amazon, *Prime Originals and Exclusives*, https://www.amazon.com/b?node=6938769011 (last visited Dec. 7, 2016). Hulu has exclusive rights to Empire (Fox), Black-ish (ABC), a number of FX shows and miniseries, the Seinfeld library, and some Disney films, among many others. *See* Michael Schneider, *Every Seinfeld Ever Is Coming to Hulu, As Part of the Streaming Service's Big Spending Spree*, TV Insider, Apr. 29, 2015, http://www.tvinsider.com/article/1579/every-seinfeld-ever-is-coming-to-hulu-as-part-of-the-streaming-services-big-spending-spree/; Nellie Andreeva, *Hulu Nabs SVOD Rights to ABC Comedy 'Black-Ish' – TCA*, Deadline Hollywood, Jan. 7, 2017, http://deadline.com/2017/01/hulu-blackishb-svod-rights-abc-comedy-1201880521/; Jon

exclusive rights. Some OVDs, like Netflix, reportedly even go so far as to dis-incentivize programmers that license prior seasons of popular series to the OVDs from licensing to MVPDs full current seasons of those same series for those MVPDs' on-demand platforms.[31]

Perhaps more significantly, these OVDs also are increasingly creating their own content by dealing directly with studios and commissioning work from independent producers.[32] This leaves OVDs less dependent than ever on any particular third-party network programming (or studio) and means that contractual provisions between traditional distributors and programmers are largely irrelevant to OVDs' ability to obtain content for their services.[33] Indeed, OVDs like Netflix, Amazon, and Hulu are now spending *billions* of dollars annually on programming, including original programming that is available exclusively on their own subscription platforms

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Lafayette, *Hulu Signs Deal to Get Some Disney Movies*, Broadcasting Cable, Dec. 27, 2016, http://www.broadcastingcable.com/news/currency/hulu-signs-deal-get-some-disney-movies/162039.

[31] *See Seventeenth Video Competition Report* ¶ 176 n.569 ("Netflix has threatened to pay content owners who make such deals [to make complete current and past seasons of some series available] with MVPDs substantially less for stacking rights, claiming that the availability of past seasons of programs on MVPDs diminishes their value to OVDs."); Keach Hagey & Shalini Ramachandran, *Hulu Steps Up Its Fight Against Netflix*, Wall St. J., June 16, 2015, http://www.wsj.com/articles/hulu-steps-up-its-fight-against-netflix-1434497311; Nellie Andreeva, *In-Season Stacking Rights – The New Upfront Battleground: Pilot Season 2016*, Deadline, May 12, 2016, http://deadline.com/2016/05/in-season-stacking-rights-upfronts-pilot-season-2016-powerless-lethal-weapon-nbc-abc-1201754408/.

[32] OVDs' success in the content creation business has led Apple to explore leveraging its streaming music service and platform to release its own original television shows and movies. *See* Ben Friz, Tripp Mickle & Hannah Karp, *Apple Sets Its Sights on Hollywood With Plans For Original Content*, Wall St. J., Jan. 12, 2017, http://www.wsj.com/articles/apple-sets-its-sights-on-hollywood-with-plans-for-original-content-1484217007 (noting that "the entry of the world's most valuable company into original television and films could be a transformative moment for Hollywood").

[33] In fact, Netflix has invested so heavily in original programming that players in the industry have expressed concerns about Netflix's purported content "monopoly." *See* Kim Masters, *The Netflix Backlash: Why Hollywood Fears a Content Monopoly*, Hollywood Reporter, Sept. 14, 2016, http://www.hollywoodreporter.com/features/netflix-backlash-why-hollywood-fears-928428; *see also* Lucas Shaw, *Netflix to Make More Shows of Its Own*, Bloomberg Tech., Sept. 24, 2015, https://www.bloomberg.com/news/articles/2015-09-25/netflix-set-to-make-more-shows-of-its-own-including-handler; Bryan Bishop, *Netflix Isn't Going to Rely on Hollywood to Make Its TV Shows*, Verge, Sept. 25, 2015, http://www.theverge.com/2015/9/25/9398465/netflix-original-series-new-production-company.

(and, in some cases, is later licensed to other OVDs and MVPDs).[34] These OVDs are spending so much on programming that "Netflix and Amazon would rank second and fifth, respectively, in programming spending among all US cable networks."[35]

In short, today's marketplace – *without* the restrictive and unnecessary government interference the NPRM proposes – has given rise to the proliferation of platforms and programming that provide viewers more access to diverse and independent content than ever before. As one recent and powerful illustration of this, the 2016 Emmy Awards were "the most diverse ever," with performers of color nominated in every leading acting category for the first time in the award show's history.[36] In this "Golden Age of Television,"[37] the riches are broadly

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[34] *See* Drew Harwell, *America Has Never Had So Much TV, And Even Hollywood Is Overwhelmed*, Wash. Post, Nov. 7, 2016, https://www.washingtonpost.com/news/the-switch/wp/2016/11/07/america-has-never-had-so-much-tv-and-even-hollywood-is-overwhelmed/; *see also* Lucas Shaw & Michaela Ross, *Media Companies Try to Spend Their Way Out of Cable TV Crunch*, Bloomberg, Mar. 2, 2016, https://www.bloomberg.com/news/articles/2016-03-02/media-companies-try-to-spend-their-way-out-of-cable-tv-crunch (projecting increased 2016 content budgets for various programmers, describing their strategy as "spend, spend, spend"); Liam Boluk, *The State and Future of Netflix v. HBO in 2015*, Redef, Mar. 5, 2015, https://redef.com/original/the-state-and-future-of-netflix-v-hbo-in-2015; Matt Wilstein, *You Can Now Watch House of Cards without Netflix Subscription*, Mediaite, Mar. 10, 2014, http://www.mediaite.com/tv/you-can-now-watch-house-of-cards-without-netflix-subscription/.

[35] BCG OTT Report at 19.

[36] *See* Kevin Fallon, *Emmy 2016 Awards: The Most Diverse Emmys Ever. Finally.*, Daily Beast, Sept. 18, 2016, http://www.thedailybeast.com/articles/2016/09/18/emmy-2016-awards-the-most-diverse-emmy-ever-finally.html; Bethonie Butler, *The Emmys are Proof That Television is Getting More Diverse*, Wash. Post, Sept. 19, 2016, https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/09/19/the-emmys-are-proof-that-television-is-getting-more-diverse/. This trend continued with the 2017 Golden Globes awards, at which "TV's biggest winner . . . [was] the diversity across all winners, in terms of both content and actors." Madeline Berg, *Thanks to Hollywood Economics, TV Diversity Wins Big at the Golden Globes*, Forbes, Jan. 9, 2017, http://www.forbes.com/sites/maddieberg/2017/01/09/thanks-to-hollywood-economics-tv-diversity-wins-big-at-the-golden-globes/#3020f8ae40d4 (discussing winners and nominees like Donald Glover's "Atlanta," "Black-ish," "The People vs. O.J. Simpson," and Issa Rae's "Insecure."); *see also* Cynthia Littleton, *Golden Globes: Big Wins Reflect Progress in Diversity on Film, TV*, Variety, Jan. 8, 2017, http://variety.com/2017/tv/news/golden-globes-big-wins-reflect-progress-in-diversity-on-film-tv-1201955582/ ("Sunday's wins demonstrate that the expansion of outlets and hunger for original series material is spreading the wealth.").

[37] *See* Tom Wheeler, Chairman, FCC, Workshop on the State of the Video Marketplace at 01:20 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("I am old enough to have been around for both golden ages of television. . . . But having now lived through both golden ages, there is no doubt in my mind that this golden age is better."); David Carr, *Barely Keeping Up in TV's New Golden Age*, N.Y. Times, Mar. 9, 2014, http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html; *see also* Christine Persaud, *The Golden Age of Television Reigns on with These 10 Highly*

shared and consumers have access to them at their fingertips. There is simply no marketplace basis for imposing the NPRM's proposed regulations.

C. Comcast And NBCUniversal Continue To Foster Independent And Diverse Programming.

Comcast and NBCUniversal are committed to continuing to be good partners to independent and diverse programmers and programming producers. As detailed in our comments in response to the NOI, Comcast has consistently expanded diverse and independent programming, increasing the amount, quality, and diversity of national and local programming for its customers across its platforms, including its VOD and online platforms.[38] Comcast carries over 160 independent networks, and Xfinity VOD and online platforms feature on-demand choices from over 70 independent networks.[39] In the last five years, Comcast has expanded the quality and quantity of diverse programming available through its VOD and online platforms to nearly 12,000 combined hours by year-end 2015, an increase of 70 percent over 2014 and more than 1,100 percent over year-end 2010.[40] In recent months, Comcast has continued to demonstrate its commitment to fostering diverse and independent voices.

- In October, Comcast premiered a new LGBT docu-series, "What Was it Like?," on its Xfinity VOD platform.[41]

Anticipated New TV Series, Digital Trends, May 18, 2016, http://www.digitaltrends.com/movies/the-10-most-anticipated-new-tv-shows-in-2016/; Julie Liesse, *How Cable's New Golden Age of Content is Changing the Game*, Advert. Age, May 1, 2015, http://adage.com/lookbook/article/cable-broadcast/cable-s-golden-age-contentchanging-game/298363/.

38 *See* Comcast NOI Comments at 16-21.

39 *See id.* at 17. Comcast has also undertaken many initiatives to promote independent film, and has partnered with independent studios to feature and launch independent films in VOD. *See id.* at 20. "Independent network" as used here means a network that is not an affiliate of Comcast or of another top-15 programming network owner, as measured by annual revenues. *See Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, App. A, § III.3 ("*Comcast-NBCUniversal Order*").

40 *See* Comcast NOI Comments at 19.

41 Jean-Claire Fitschen, *Comcast Premieres New LGBT Docu-Series, 'What Was it Like?' On Xfinity On Demand*, Comcast Voices, Oct. 11, 2016, http://corporate.comcast.com/comcast-voices/comcast-premieres-new-

- In November, Comcast announced that Sling TV will launch on the X1 platform, giving Comcast's X1 customers access to more than 320 multicultural networks in 21 languages.[42]

- In December, Comcast announced that it is accepting proposals for two substantially African American owned, independent networks that it will launch in select markets by January 2019.[43]

- In January 2017, Comcast will launch two new independent networks targeted to bicultural Hispanic youth, Kids Central and Primo TV.[44]

As the volume of programming continues to grow, Comcast continues to seek innovative ways to work with independent programmers to feature content on platforms across multiple screens.[45]

NBCUniversal is similarly committed to featuring diverse and independent voices in film and on television. Here are just a few highlights:

- The majority of primetime programming on the combined NBC Networks (NBC Network and Cable Entertainment networks) is produced by studios unaffiliated with NBCUniversal or Comcast, and the vast majority of the primetime programming on the Cable Entertainment networks (Bravo, E!, Oxygen, Syfy, and USA) is sourced from producers not affiliated with major studios or broadcast

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lgbt-docu-series-what-was-it-like-on-xfinity-on-demand. Also in October, Comcast/NBCUniversal launched a new Diversity and Inclusion newsletter called "On Diversity," which curates stories detailing the business impact that diversity and inclusion has on companies today. *See* Press Release, Comcast Corp., On Diversity: Corporate Diversity & Inclusion Launches Quarterly Newsletter, Oct. 2016, http://corporate.comcast.com/news-information/news-feed/on-diversity-newsletter-launches.

[42] Press Release, Comcast Corp., Comcast Boosts Multicultural Programming with the Launch of Sling TV on X1, Nov. 22, 2016, http://corporate.comcast.com/news-information/news-feed/sling-tv-to-launch-on-comcast-x1-platform.

[43] Press Release, Comcast Corp., Comcast Cable Accepting Proposals for Two New African American Owned Independent Networks, Dec. 15, 2016, http://corporate.comcast.com/news-information/news-feed/comcast-cable-accepting-proposals-for-two-new-african-american-owned-independent-networks.

[44] Press Release, Comcast Corp., Comcast Announces Agreements with Two New Hispanic American-Owned Independent Networks, Nov. 15, 2016, http://corporate.comcast.com/news-information/news-feed/comcast-announces-agreements-with-two-new-hispanic-american-owned-independent-networks.

[45] *See* Comcast NOI Comments at 18-19. For instance, Comcast has created Xfinity "microsites," first-of-their-kind, one-stop Internet destinations for entertainment features and news tailored for African-American, Asian-American, Hispanic-American, and LGBT audiences (Celebrate Black TV, Xfinity Latino, Xfinity Asia, Xfinity.com/LGBT), and in support of events like Disability Awareness Month, Veterans Day, and Native American Heritage Month. *Id.* at 19. Comcast also launched Watchable, a cross-platform video service that curates a selection of popular online video networks and shows in an easy-to-use experience, and features videos from over 40 independent digital partners. *See id.* at 21.

or cable networks.[46]

- Universal Studios is home to more than 20 production companies, and NBCUniversal-owned Focus Features makes, acquires, and releases a diverse slate of films, including specialty films.[47]

- In November, Focus Features' "Loving" hit theaters, a historical drama that tells the story of the Supreme Court decision that invalidated state laws prohibiting interracial marriage.

- Telemundo is the largest producer of Spanish language prime-time television programming in the nation, and launched a multiplatform initiative encouraging Hispanics to get out to vote in conjunction with the 2016 election.[48]

- NBCUniversal was nominated for 23 GLAAD Awards in 2016, which honor media for their accurate and inclusive representations of the LGBT community.[49]

- NBCUniversal offers a slate of highly-successful talent pipeline programs, which are detailed in Comcast/NBCUniversal's annual Diversity and Inclusion reports along with other diversity initiatives.[50]

III. MFNS AND ADMS ARE COMMONPLACE CONTRACTUAL PROVISIONS THAT DO NOT HARM INDEPENDENT OR DIVERSE PROGRAMMING, AND ADOPTION OF THE NPRM'S PROPOSED RESTRICTIONS LIKELY *WOULD* HARM SUCH PROGRAMMING.

The NPRM correctly acknowledges that both MFN and ADM provisions have "legitimate public interest justifications," including "incentiviz[ing] MVPDs to invest in new or emerging programming sources" and "broadening MVPD subscribers' access to video content

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[46] *See id.* at 22.

[47] *See id.* at 21-22. Universal Pictures and Focus Features strive to attract a diverse range of talent and filmmakers who reflect the broad spectrum of today's movie-going audiences. *Id.* at 22-23.

[48] *See* Press Release, Comcast Corp., Telemundo Launches Multiplatform Campaign to Encourage Hispanics to Get Out to Vote, Oct. 19, 2016, http://corporate.comcast.com/news-information/news-feed/telemundos-yodecido-multiplatform-campaign-encourages-hispanics-to-get-out-to-vote.

[49] Press Release, NBCUniversal, Inc., Comcast NBCUniversal Receives 23 GLAAD Nominations, Jan. 27, 2016, http://www.nbcuniversal.com/article/comcast-nbcuniversal-receives-23-glaad-nominations.

[50] *See Our Foundation for Innovation*, July 13, 2016, http://corporate.comcast.com/images/2016-Diversity-and-Inclusion-Report.pdf (the 2015 Comcast-NBCUniversal Diversity and Inclusion Report); *Seeing the Bigger Picture*, at 41-44, June 2, 2014, http://corporate.comcast.com/images/Comcast_Diversity_Report_060214.pdf (the 2013 Comcast-NBCUniversal Diversity and Inclusion Report); *Our Principles in Practice*, at 26, June 15, 2015, http://corporate.comcast.com/images/2014-Diversity-and-Inclusion-Report.pdf (the 2014 Comcast-NBCUniversal Diversity and Inclusion Report).

by allowing MVPDs to secure additional rights to programming."[51] Nonetheless, the NPRM proposes to restrict the use of these provisions in negotiations with a certain subset of "independent" programmers.[52] MFNs and ADMs reduce transaction costs, risks, and uncertainties and foster workable agreements for programmers and MVPDs, particularly with respect to new networks for which these risks and uncertainties may be greater, and MVPDs may not be willing to take on the risks absent these contractual assurances. Thus, the NPRM's proposal not only needlessly interferes with a robust and healthy marketplace and assumes harms where there are none, but could have serious unintended consequences that lead to a *decreased* supply of independent programming.

A. The NPRM's Proposal To Prohibit Unconditional MFNs Is Misguided And Would Not Serve The Public Interest.

The NPRM paints a dismal picture of MFNs, when in fact they are the result of common and appropriate considerations and the product of arms-length contractual negotiations. As a general rule, MFNs are a form of insurance policy for distributors – and their customers – against the risk of being shut out of certain benefits (including lower pricing) that programmers may subsequently extend to other distributors.[53] As such, MFNs can be *pro-consumer*, because they ensure that MVPD customers can enjoy the full value of the subscriptions for which they are already paying,[54] and MFNs may make it *more* likely that an MVPD will be willing to take the

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[51] *See* NPRM ¶ 19.

[52] *See id.* ¶ 23.

[53] That is, MFNs help "future proof" an agreement by ensuring that, if a programmer is prepared to share more favorable terms and conditions (e.g., better pricing) or additional content with other distributors (e.g., broader VOD rights to current-season programs), then the MVPD with the benefit of the MFN will have an opportunity to obtain the same terms, conditions, or content, thereby benefiting the MVPD's customers.

[54] *See* Tasneem Chipty, Managing Principal, Analysis Group, Second Media Bureau Workshop on the State of the Video Marketplace, Introductory Remarks, at 4 (Apr. 25, 2016), https://ecfsapi.fcc.gov/file/60001712296.pdf ("There are . . . some procompetitive justifications for MFN provisions. Programmers may say that they help reduce holdouts and delays in negotiations, because the MVPD can receive assurance that they are not getting a worse deal

risk of carrying an independent or diverse network (or the risk of carrying a network more broadly or at a higher price than might ultimately be warranted). The Commission has previously recognized the pro-competitive functions of MFNs, stating: "[T]he existence of [MFN] clauses . . . in many programming contracts . . . eliminates cable operators' ability to free ride on other MVPDs' paying for the fixed costs of creating the programming."[55] That is, "the ubiquity of so-called most-favored-nation clauses in programming contracts resolves this free-rider problem and protects the cable operator who initially purchases the programming from opportunism on the part of the programmer and other operators."[56] Courts and the antitrust agencies have likewise recognized that MFNs can be pro-competitive and pro-consumer.[57]

The NPRM puts great emphasis on a distinction between "unconditional" and other MFNs, and between conditions that are "integrally related," "logically linked," or "directly tied"

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than anyone else. Such provisions can also allow long-term contracts to adapt to changing market conditions."); OECD Competition Committee, Price Transparency, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, Policy Roundtables, at 12 (2001), http://www.oecd.org/competition/abuse/2535975.pdf ("In their many variations . . . MFNs can introduce valuable price flexibility into long term contracts and may also offer valuable insurance to certain actors. That may explain why they are found in a wide range of market settings and are often adopted unilaterally by sellers sometimes on request by their customers.").

[55] *Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 9374 ¶ 97 n.342 (2005).

[56] *Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2134 ¶ 33 (2008) (subsequent history omitted).

[57] *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, C.J.) (MFNs are "standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. . . . [T]hat is the sort of conduct that the antitrust laws seek to encourage."); Comments of David Gelfand, DOJ/FTC Workshop on Most-Favored Nation (MFN) Clauses and Antitrust Enforcement & Policy, at 20 (Sept. 10, 2012), https://www.healthlawyers.org/Members/PracticeGroups/Documents/Benefits/PGs_ExSumm_MFN_Clauses.pdf (MFNs "are simply an efficient way to get the best deal possible without spending time on the contract and moving on to deals that may be more important to the company."); Outline of Remarks by Andrew I. Gavil, Director, Office of Policy Planning, Federal Trade Commission, at 6 (Sept. 2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/09/11/286852.pdf (discussing the procompetitive benefits of MFNs, including as a means to avoid becoming "a disfavored purchaser" on price).

to certain benefits versus those that are not.[58] But such distinctions are not clear-cut, much less consistently applied, in real-world negotiations, even if those terms are commonly used in agreements.[59] To take just one "simple" example, assume MVPD A has an MFN on price for Programmer's "X" network. Programmer has given MVPD B a better price for carriage of the X network, but perhaps did so (in part or in whole) because MVPD B increased carriage of Programmer's "Y" network and launched Programmer's "Z" network. MVPD A naturally wants the benefit of the same price of the X network, but is unwilling or unable to launch network Z or increase the carriage of network Y. Are the carriage arrangements of networks X, Y, and Z logically, integrally, or directly linked to the price of network X? Perhaps yes from Programmer's perspective, and no from the MVPD's perspective. Perhaps the parties will attempt to negotiate additional provisions resolving this issue. Whatever arrangements MVPD A and Programmer hash out between them about the scope and applicability of an MFN provision, as they work toward a mutually satisfactory contract on an *ex ante* basis in the face of significant uncertainty, it is highly unlikely such negotiations would be well served – i.e., would lead to better contracts, or more programming finding its way to consumers on attractive terms – by the prospect of government involvement in deciding what terms are reasonable versus which are unreasonable. Quite the opposite. If the NPRM's proposals are adopted – opening up the program carriage complaint processes to grievances about perceived "unreasonable" contract terms – programmers might have perverse incentives to litigate first rather than negotiate and

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[58] NPRM ¶ 18. The NPRM defines an "unconditional" MFN as "a provision that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor's agreement, and with which the MVPD can reasonably comply technologically and legally." *Id.*

[59] *Id.*

work through these issues, among other unintended consequences (discussed below).[60] And the NPRM's proposed rule also would open the door to a hodgepodge of additional disputes over price and other issues.[61]

As this example shows, program carriage negotiations are complex and often involve a give and take on a range of issues across the entirety of the agreement, such that provisions that appear to be unconnected to other obligations may actually involve a key exchange of

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[60] In contrast to the retransmission consent regime, which imposes reciprocal obligations on MVPDs and programmers, *see* 47 C.F.R. § 76.65(c), the program carriage regime imposes obligations exclusively on MVPDs, *see id.* § 76.1301, and so can create perverse incentives for a programmer to adopt a take-it-or-leave it posture and threaten to litigate rather than negotiate.

[61] In its comments in response to the NOI, TheBlaze provided the following example of how it claims an allegedly unconditional MFN provision operates to harm a programmer and a competing distributor:

> [A]n independent programmer may reach a distribution agreement with Distributor A for carriage on the most widely distributed tier in exchange for which Distributor A receives a significant discount of its affiliate fee. If Distributor B carries the independent programmer's content on a low penetrated tier and receives no discount on its affiliate fee but has an unconditional MFN in its deal with the programmer, Distributor B would be entitled to the benefit of the discounted affiliate fee without giving the video programmer the better packaging. The result is that Distributor B gains an unfair advantage market advantage over competitors.

Comments of TheBlaze, MB Docket No. 16-41, at 5 (filed Mar. 30, 2016).

This example proves the *opposite* of TheBlaze's point, however; it in fact demonstrates that provisions that are reasonable will be subject to regulatory gamesmanship if the NPRM's proposals are adopted. As a matter of terminology, there is no reason that the MFN provision at issue is necessarily unconditional, as TheBlaze claims. Instead, it could be a straightforward MFN on price based on *total volume* of subscribers delivered by a distributor – a specific and concrete condition – rather than based on the *package level or penetration percentage* at which another distributor carries the service. To tease out the example further with specific numbers: Suppose Distributor B has 10 million total subscribers, and is carrying the programmer on a "low penetrated" tier of only 3 million subscribers (or 30 percent penetration). Distributor A, however, has only 300,000 subscribers, and its "most widely distributed tier" – for which it receives a "significant discount" on price – is 80 percent of its customer base, or 240,000 subscribers. In this example, Distributor B is still delivering the programming to more than *ten times* the number of subscribers as Distributor A (and it might also be assumed that Distributor B has been doing so for a while, perhaps even before other distributors committed to carry the network). If Distributor B's MFN applies, then Distributor B will have the right to obtain the same significant discount as Distributor A enjoys. And why not? Viewed from the consumer standpoint, this is not an "unfair market advantage" conferred on Distributor B but rather a means of protection and cost control for Distributor B's customers. Put another way, why should the programmer enjoy the windfall of being distributed to 3 million of Distributor B's customers at an inflated price when it is willing to sell that programming at a discount to Distributor A, which is carrying the programming to a far smaller group of customers? This is not to say, however, that volume-based rather than penetration-based MFN provisions are necessarily the "right" approach; each negotiation is unique, and different MVPDs and programmers may have different business strategies or be willing to incur different risks in fashioning mutually beneficial arrangements. The point is only that there is nothing inherently "unreasonable" in the scenario painted by TheBlaze, and market participants should retain the freedom to structure the business arrangements that work for them.

consideration. One fundamental fallacy underlying the NPRM's proposal is the view that unconditional MFNs cannot reflect a fair bargain because they do not "obligat[e] the MVPD to provide the same or equivalent consideration in exchange for" favorable terms granted to another distributor.[62] But that is looking at the question of consideration from an unduly narrow perspective. The equation of consideration in exchange for value is not always only about *future* consideration. The MVPD may well have *already* provided substantial consideration for the additional protection afforded by a broader or unconditional MFN in the contract itself, in the form of substantial carriage, license fees, marketing, etc. – or in the form of assuming the risk of obligating itself to devote valuable bandwidth to initially launch a network for which there is little evidence of marketplace demand. The NPRM overlooks the fact that limiting the breadth of MFNs that distributors can seek may also limit the consideration that they are willing to offer *in the first place*.

The NPRM labors under an even more fundamental fallacy – that there are "[no] public interest benefits that accrue" from unconditional MFNs.[63] But that is plainly wrong. Even provisions that could fall under the NPRM's definition of unconditional can have important public interest benefits. For example, an MFN might ensure that a programmer delivers streams of programming formatted in accordance with the most updated technology if the programmer is making programming available to other MVPDs in the updated format. Such a provision reasonably may not require the MVPD to accept a new set of obligations or terms of the other MVPD just to receive the benefit of the new technology that the programmer is already using. But this type of MFN, although quite possibly unconditional by the NPRM's proposed standards,

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62 NPRM ¶ 19.

63 *See* NPRM ¶ 20.

would serve the public interest by guaranteeing that consumers receive the best possible quality of programming right away and eliminate costs associated with the need to renegotiate agreements every time a new technology is made available. The same principle can also apply to so-called unconditional MFNs that go to price or content rights, by ensuring that, during the term of the contract, not every new right or benefit that flows through to the MVPD via the MFN must be subject to additional obligations on the part of the MVPD.

For this reason, even if the Commission were to (wrongly) believe that certain types of unconditional MFNs were inherently problematic or "unreasonable," a one-size-fits-all ban on MFNs that are not tied to commensurate burdens surely would sweep in provisions that are, in fact, pro-consumer and pro-competitive. Given the complexity of the negotiations at issue, the high level of competition and dynamism of the marketplace, and the potential for misuse of regulatory processes, the Commission cannot reasonably conclude that MFNs and ADMs are harming independent programmers, or that more benefits than harms to competition, diversity, or supply of programming would flow from such heavy-handed regulatory intervention.

B. The NPRM's Proposal To Prohibit "Unreasonable" ADMs Would Needlessly Interfere In Negotiations And Would Not Serve The Public Interest.

As explained in our NOI comments, ADMs are simply a form of windowing that has been successfully employed for decades by the entertainment industry to maximize the value of content.[64] Windowing, which is widely acknowledged to have led to the success of the American television and film industry, protects and encourages programmers' and distributors' investment in content and ensures that consumers get valuable access to content for the price they pay. Although there may have been cases where ADMs were overly restrictive, these types

[64] *See* Comcast NOI Comments at 30.

of provisions are increasingly falling by the wayside as online distribution has become an even more valuable outlet for content companies. A typical ADM today is usually limited to prohibiting free online distribution of substantial network content for a limited period of time during which an MVPD has program distribution rights for which it usually has paid substantial licensing fees. Moreover, as shown above, there is simply no evidence that ADMs present significant issues in the MVPD marketplace today. Sony PlayStation Vue, Sling TV, and DirecTV Now, all of which have launched in the past few years (or weeks, in the case of DirecTV Now), exhibit a wide array of linear networks via the Internet. Indeed, the fact that large MVPDs like Dish and DirecTV have launched linear OVD services makes it difficult to imagine that there is much appetite (or ability) on the part of MVPDs to insist on – or programmers to agree to – so-called "unreasonable" ADMs in today's marketplace. In fact, many networks offer their content online on an a la carte basis,[65] and several premium networks offer content in conjunction with Amazon Prime or Hulu.[66]

Like MFNs, ADMs in today's marketplace can help programmers and distributors reach mutually beneficial deals by lowering risk for distributors and safeguarding the value of the programming for which the distributor and its customers are paying. In all events, while it may be possible to find common ground that certain extreme (and largely obsolete) types of ADM provisions are "unreasonable," there is no basis to impose on MVPDs a one-sided obligation on their contracting practices when OVDs are perfectly free to insist on provisions that limit or

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[65] *See, e.g.*, CBS All Access, http://www.cbs.com/allaccess (last visited Dec. 6, 2016); Univision NOW, http://www.univisionnow.com/ (last visited Dec. 12, 2016); Food Network: Full Episodes, http://www.foodnetwork.com/videos/players/food-network-full-episodes.html (last visited Dec. 12, 2016); HBO NOW, https://order.hbonow.com/ (last visited Dec. 6, 2016); MLB.tv, http://mlb.mlb.com/mlb/subscriptions/ (last visited Dec. 12, 2016).

[66] *See, e.g.*, Davey Alba, *Amazon Prime Members Can Now Subscribe to Showtime and Other Channels A La Carte*, Wired, Dec. 8, 2015, https://www.wired.com/2015/12/amazon-prime-members-can-subcribe-to-showtime-and-other-channels-a-la-carte/; Hulu with Showtime, http://www.hulu.com/getshowtime (last visited Dec. 12, 2016).

restrict the programming that can be shown on *MVPD* platforms (which, indeed, some do). This proposal, too, is more likely to lead to distortion of negotiations and regulatory gamesmanship than actually yield public interest benefits.

C. Restricting The Use of MFNs And ADMs Could Have Serious Unintended Consequences, Including *Diminished* Carriage Of Independent And Diverse Programming.

Critically, there is no marketplace evidence that MFNs or ADMs in programming agreements with MVPDs are preventing content from being licensed to OVDs or preventing independent and diverse programming from reaching audiences. As noted above, it is hard to find content that is *not* available in some form on OVDs. Consequently, restricting specific contractual provisions that make distribution of independent and diverse programming more attractive to an MVPD may have the exact *opposite* effect of what was intended by the NPRM – namely, *diminishing* the likelihood that MVPDs will be willing to carry such programming.

Restrictions on MFNs and ADMs also may well lead to more exclusive arrangements between programmers and distributors and higher prices.[67] For example, limiting an MVPD's ability to enter into an MFN granting it the right to network programming that the programmer makes available to another distributor could result in more exclusives between the programmer and other distributors, which may serve the interest of the OVD but may not be in the consumer's best interest. And imposing restrictions only with respect to negotiations with a certain class of "independent" networks, as proposed in the NPRM,[68] could cause marketplace

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[67] As discussed in our NOI Comments, MFNs related to pricing serve the pro-competitive purpose of lowering prices. *See* Comcast NOI Comments at 26-27.

[68] *See* NPRM ¶ 17. The NPRM asks about a variety of ways to narrow the definition of "independent video programming vendor," such as by excluding from the definition any programmer that is not affiliated with a broadcast network, movie studio, or MVPD, or by defining the term with reference to annual gross revenue and/or assets. *See id.* Each of these proposed definitions would present numerous practical and administrative difficulties (as well as Constitutional infirmities discussed in Section V below), and would have the effect of singling out

distortions and make MVPDs *less inclined* to risk carrying such networks in the first place. After all, MVPDs are under no obligation to carry any cable networks. Conversely, if the Commission were to persist with its original, broader proposed definition of "independent" networks as meaning those not vertically integrated with an MVPD,[69] that would mean that the vast majority of programmers – including the very largest (such as Fox, Disney, CBS, and Viacom) would have *increased* leverage in negotiations with MVPDs. This cannot be the intended consequence of an inquiry designed to benefit smaller independent programmers.

Moreover, by serving as built-in automatic adjustment mechanism to ensure that customers benefit on a timely basis from things like technology upgrades, content improvements, lower prices, etc., MFNs permit and encourage programmers and distributors to enter into longer-term agreements than they otherwise would have. By contrast, if such automatic adjustment mechanisms were *not* permitted, or were somehow *curtailed* by FCC regulations, the unfortunate result likely would be that distributors would not want to commit to longer-term carriage agreements in certain cases. That, in turn, would mean many more *shorter-term* deals with many more opportunities for program networks to be pulled or dropped in connection with renewal negotiations, and/or faster rate increases if certain networks can pursue rate resets at shorter intervals. That altered marketplace dynamic would not serve new independent and diverse networks, which benefit under the current industry approach that typically affords them a longer period of time to establish themselves and prove their value to customers. Simply put, the reduced availability of MFN protection would not only cause some distributors to avoid taking

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particular networks as presenting litigation risks. For example, categorizing networks as "independent" based on their being below an annual revenue threshold would mean that MVPDs would not have certainty from year to year as to which set of regulations apply to many programmers.

69 *See id.*

chances on the carriage of independent and diverse networks *at all*, but even for those distributors that *do* choose to carry such networks, it would discourage them from committing to the longer-term certainty that has been provided in affiliation agreements in the current highly successful video marketplace. This is just another example of the significant unintended consequences regulation of MFNs would likely produce – which would actually *harm* independent and diverse programmers rather than help them. And such altered marketplace dynamics would also harm MVPD customers by producing *less* price certainty, *less* content certainty, and *less* timely access to program network upgrades and improvements than they routinely benefit from today.

Accordingly, the Commission should decline to restrict the use of MFNs or ADMs.

IV. THE FCC HAS NO AUTHORITY TO REGULATE AS PROPOSED IN THE NPRM.

Beyond a lack of marketplace evidence justifying the restrictions proposed in the NPRM, and even putting aside the adverse unintended consequences such restrictions could have, the Commission has no authority to regulate further in these areas, and doing so would violate the First Amendment.

A. Section 616 Does Not Provide The Commission Authority To Adopt The Proposed Regulations.

The Commission seeks comment on its authority under Section 616 of the Communications Act to adopt rules limiting the use of MFN provisions and ADM clauses in carriage agreements between MVPDs and independent video programming vendors.[70] Section 616 does not give the Commission authority to adopt such rules. The NPRM's broad

[70] *See id.* ¶ 34. Although the NPRM asks whether the Commission should consider additional programming rules to advance competition, diversity, and innovation in the marketplace, *id.* ¶¶ 32-33, the questions about legal authority pertain only to rules limiting the use of MFNs and ADMs. The omission is a moot point, because the Commission lacks legal authority to adopt any of the rules about which the NPRM inquires.

interpretation of Section 616(a) as a grant of general rulemaking authority cannot be squared with the text, structure, or legislative history of that provision, is contrary to Commission precedent, and would pose grave constitutional problems.

1. Nothing in the statutory text, structure, or legislative history of Section 616(a) suggests it conveys regulatory powers beyond those enumerated in Section 616(a)(1)-(6).

The NPRM asserts that Section 616(a) "reasonably can be read to grant general rulemaking authority."[71] Such an interpretation is not reasonable. The NPRM's proposed interpretation is belied by the plain language and structure of Section 616 and Title VI of the Communications Act.

In Section 616, Congress explicitly directed the Commission to adopt regulations proscribing specific practices in the negotiation of carriage agreements. The introductory language in Section 616(a) states clearly that "[s]uch regulations shall" address each of six enumerated subsections – the first three address specific conduct to be proscribed, and the remaining three address process and penalties (including penalties for filing frivolous program carriage complaints).[72] Notably, Section 616(a) does *not* contain the words "include," "contain," "minimum contents of regulations," or any other terms that would indicate that it could reasonably be interpreted as a catch-all provision or a floor for Commission regulation.[73] As then-Commissioner Pai observed:

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71 *Id.* ¶ 34.

72 47 U.S.C. § 536.

73 Rather, the subsections that follow Section 616(a) direct the Commission to adopt regulations that "include" and "contain" provisions "designed to" accomplish the *specific purposes set forth in those subsections*. *See id.* That is, Congress afforded the Commission some discretion to determine the best of potentially multiple approaches to prohibit the enumerated harms, which is precisely what the Commission did in the implementing rulemaking proceeding. The NPRM points to no authority for the contrary proposition that such terms can "reasonably" be read back into the preamble language to afford the Commission unlimited authority to address *other*, un-enumerated harms. By contrast, Section 628(b) directed the Commission to establish regulations to

> [I]n the almost quarter-century since section 616(a) was enacted into law, the Commission has never issued regulations under this provision that go beyond the six requirements specified under the provision . . . Congress, in Title VI of the Communications Act, clearly knew how to indicate that particular regulatory mandates established a floor for the Commission's authority rather than a ceiling.[74]

After years of hearings with specific findings in the legislative history, Congress determined that three practices were particularly problematic to a diverse and competitive video marketplace,[75] and accordingly expressly prohibited these three specific practices in order to reduce the potential for anticompetitive actions by MVPDs against programming entities.[76] Beyond the three specific conduct prohibitions enumerated in the statute, there is no evidence that Congress intended otherwise to interfere with ordinary marketplace negotiations. To the contrary, Congress left no doubt that the Commission must "rely on the marketplace, to the maximum extent feasible."[77] This conclusion is further reinforced by Congress's mandate in

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prohibit cable operators and others from engaging in unfair methods of competition, etc., the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to consumers. This was in and of itself a substantive conduct prohibition, in contrast to Section 616(a). In Section 628(c)(2), Congress specified four different types of regulations that the Commission should adopt, but titled the provision "*Minimum contents of regulations*." *See id.* § 548 (emphasis added). *Cf. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, FCC 16-148, ¶¶ 347-353 (Nov. 2, 2016) (citing Sections 628 and 222(a) to argue that Section 222(a) provides broad authority and is not just precatory or a preamble, and omitting any discussion of Section 616).

74 *See* NPRM, 31 FCC Rcd. at 11395 (Dissenting Statement of Commissioner Pai) (contrasting the broader language of Section 628(c) with the narrow language of Section 616(a)).

75 Specifically, Section 616 provides for the prohibition of three specific agreements and practices: (1) discrimination by vertically integrated MVPDs on the basis of affiliation that unreasonably prevents programmers from competing fairly, (2) attempts by MVPDs to coerce programming vendors to relinquish ownership interests as a condition of carriage, and (3) attempts by MVPDs to coerce programming vendors into granting exclusive rights. *See* 47 U.S.C. § 536(a)(1)-(3).

76 *See* H.R. Rep. No. 102-628, at 43 (1992) ("In order to stem and reduce the potential for abusive or anticompetitive actions against programming entities, the legislation prohibits multichannel video programming distributors from coercing programmers to provide exclusivity for video programming against other multichannel video programming distributors as a condition of carriage on a cable system; from requiring a financial interest in a program service as a condition of carriage; and from discriminating against non-affiliated cable programming services with respect to terms and conditions of carriage.").

77 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460, 1463 (1992).

Section 624(f) that any attempt to regulate the *content or provision* of cable services must be "expressly provided" in Title VI of the Act – a standard that the proposed regulations certainly do *not* meet, since none of them are even *mentioned* in the Act, let alone "expressly provided."[78]

The Commission fulfilled Congress's statutory mandate in 1993 by imposing the specific limitations set forth in Section 616, recognizing that the "regulations must strike a balance that not only pr[o]scribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."[79] To achieve that balance, the FCC "adopt[ed] general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements."[80] Furthermore, the Commission wisely decided to develop a body of law through *ex post* adjudications rather than proscribe conduct on an *ex ante* basis, because "the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation," and that it therefore should "identify specific behavior that constitutes 'coercion' and 'discrimination'" only "as [it] resolve[s] particular [program carriage] complaints."[81] Thus, even in a marketplace that was not nearly as

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78 *See* 47 U.S.C. § 544(f) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter," i.e., Title VI). In reversing the standstill rule included in the program carriage revisions adopted by the Commission in 2011, the Second Circuit noted that Section 624(f) could pose an obstacle to Commission regulation: "Moreover, as the *2011 FCC Order* itself acknowledges, there are serious questions as to whether §§ 616 and 624 of the Communications Act *prohibit* the FCC, at least in certain circumstances, from issuing a standstill order in the program carriage context." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 169 (2d Cir. 2013) ("*Time Warner Cable Inc.*") (citing *Revision of the Commission's Program Carriage Rules*, Second Report and Order, 26 FCC Rcd. 11494 ¶ 26 n.107 (2011) ("*2011 Program Carriage Order*")).

79 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd. 2642 ¶ 14 (1993).

80 *Id.*

81 *Id.*

competitive as it is today, the Commission properly determined to limit its role in program carriage negotiations to the specific problematic conduct identified by Congress. There is even less basis or legal justification for pursuing a different and more expansive regulatory approach in today's highly competitive and dynamic video marketplace.

2. The NPRM's interpretation of Section 616(a) would violate the non-delegation doctrine.

The Constitution vests "all legislative Powers" in Congress,[82] and the Supreme Court has made clear that Congress cannot delegate such powers to the Executive branch or administrative agencies. It is black letter law that an agency may not issue a given regulation unless it has a "textual commitment of authority" to do so.[83] Indeed, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[84] Citing the "broad" nature of the introductory language in Section 616(a), the NPRM asserts that "nothing in the statute expressly precludes" it from establishing rules under that subsection.[85] But that is the wrong analysis. Courts have rightly rejected such a maximalist approach to delegation of agency authority. As the D.C. Circuit has explained, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[86]

The non-delegation doctrine requires that Congress's delegation of rulemaking power to an agency be "specific and detailed."[87] Congress must "clearly delineat[e] the general policy" an

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82 U.S. Const. art. I, § 1.

83 *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

84 *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

85 NPRM ¶ 36.

86 *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (as amended).

87 *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

agency is to achieve and must specify the "boundaries of [the] delegated authority."[88] The NPRM's proposed reading of Section 616(a) would lack any limiting principle – in direct violation of the non-delegation doctrine – if interpreted as a standalone source of authority rather than as a prologue to the subsections that follow. The D.C. Circuit has cautioned the Commission against such an interpretation of "a statutory grant without bounds," stating that "in proscribing an overbroad set of practices . . . an agency might stray so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious."[89]

Because interpreting Section 616(a) as a source of standalone authority would pose significant constitutional concerns, such an interpretation would correctly be rejected by reviewing courts. The doctrine of "constitutional doubt" requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that [the statutes are] unconstitutional, but also grave doubts upon that score."[90] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . . 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[91] Applying this doctrine, the Supreme Court has favored statutory constructions that avoid a "sweeping delegation of legislative power" in violation of the

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88 *Id.* at 372-73. Congress must "'lay down by legislative act an intelligible principle,'" and the agency must follow it. *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("*Hampton*")); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536-37 (2009) (Kennedy, J., concurring) ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.").

89 *NCTA v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009).

90 *United States v. Moy*, 241 U.S. 394, 401 (1916).

91 *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

non-delegation doctrine.[92] This principle applies doubly here: Not only would such a construction raise significant non-delegation issues, but it also would constitute an unwarranted infringement on MVPDs' First Amendment press and speech rights, discussed *infra*, Section V.

3. The Commission cannot rely on Section 616(a)(3) as a source of authority for the proposed regulations.

The NPRM is also incorrect in suggesting that it may instead rely upon the specific non-discrimination provision – Section 616(a)(3) – as a source of authority for the proposed regulations. That provision prohibits vertically integrated MVPDs from "engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation,"[93] and its relatively narrow scope is well understood via litigation at the Commission and judicial appeals of Commission decisions over the last decade.[94] Notably, in establishing

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[92] *See Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 640-46 (1980) (Stevens, J., plurality) (concluding that a statute requiring an agency to regulate hazards "to the extent feasible" precluded adoption of any health-based regulation unless the agency made a finding that the preexisting situation created "a significant risk," because interpreting the statute not to require such a finding "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional. . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored." (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935) ("*Schechter*"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935))); *see also NCTA v. United States*, 415 U.S. 336, 342 (1974) ("[H]urdles revealed in [*Schechter* and *Hampton*] lead us to read the Act narrowly to avoid constitutional problems."); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing the Passport Act of 1926 in a limited way to avoid an invalid delegation of power to the Executive).

[93] 47 U.S.C. § 536(a)(3).

[94] Section 616(a)(3) addresses discrimination on the basis of non-ownership, and resolving complaints under this subsection involves a case-by-case inquiry into the facts of each negotiation and the specific network at issue. *See, e.g.*, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network*, Memorandum Opinion and Order, 25 FCC Rcd. 18099 ¶ 12 (2010) (subsequent history omitted) ("The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out 'on the basis of [an unaffiliated programming vendor's] affiliation or nonaffiliation'. . . . [A] vertically-integrated MVPD '[may treat] unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity.'"). To establish a prima facie case of discrimination under Section 616(a)(3), complainants must provide either direct evidence of discrimination on the basis of affiliation, or circumstantial evidence that (1) the unaffiliated video programming vendor provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD and (2) the defendant MVPD has treated the video programming provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage. *See 2011*

Section 616(a)(3), Congress made clear that it "[did] not intend . . . for the Commission to create new standards for conduct in determining discrimination" but instead directed the Commission to be guided by "the extensive body of law . . . addressing discrimination in normal business practices."[95] Section 616(a)(3) cannot be used to justify the broad prohibitions on ADMs and MFNs proposed by the NPRM, as this subsection would apply only to the extent MVPDs are offering different terms and conditions of carriage to similarly situated programmers based on affiliation, with the effect of unreasonably restraining the ability of such unaffiliated programmers to compete fairly. Where these conditions are met, programmers *already* have the ability to bring complaints under the program carriage rules as they stand today.[96] In all events, even assuming the Commission theoretically had authority to range beyond the plain text of Section 616, it would be arbitrary and capricious to *expand* the scope of the statutory provision nearly 25 years later, when the market for video programming distribution is highly competitive and growing more so each day.[97]

Program Carriage Order, 26 FCC Rcd. 11494 (2011), *rev'd in part*, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013); *see also Game Show Network, LLC v. Cablevision Systems Corp.*, Exceptions to the Initial Decision, MB Docket No. 12-122, File No. CSR-8529-P (filed Jan. 3, 2017) (challenging the ALJ's Initial Decision on multiple grounds).

95 H.R. Rep. No. 102-628, at 110 (1992).

96 The complainant would, consistent with precedent and the statutory and regulatory language, have to prove that, if discrimination occurred, the effect must be to unreasonably restrain the ability of the programmer to compete fairly. *See* 47 U.S.C. § 536(a)(3); *2011 Program Carriage Order* ¶ 15 ("[W]e note that the program carriage discrimination provision prohibits only conduct that has 'the effect of . . . unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly.' Thus, regardless of whether the complainant relies on direct or circumstantial evidence of discrimination 'on the basis of affiliation or non-affiliation,' the complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly.").

97 If anything, it makes sense to *narrow* the application of Section 616 with a more rigorous test for "unreasonable restraint." *See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) ("*Comcast Cable Commc'ns*") (Kavanaugh, J., concurring) ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market."). The marketplace has only become more competitive since this ruling. *See supra* Section II; *see also Time Warner Cable Inc.*, 729 F.3d at 161 (warning that, if the trend towards increased competition continued, "a day

B. The Commission Cannot Rely On Section 628 To Adopt The Proposed Rules.

Congress enacted Section 628 as a part of the 1992 Cable Act to make certain that "vertically integrated, national cable programmers . . . make programming available to all cable operators and their buying agents on similar price, terms, and conditions."[98] Thus, by its very terms, Section 628 is concerned with ensuring that non-affiliated MVPDs have *access* to channels owned by vertically-integrated programmers; it regulates the *sale* of cable-affiliated programming. Nothing in the text of Section 628 or its legislative history suggests that it was intended to provide the Commission authority to regulate the terms under which MVPDs arrange to *buy* programming, such as MFNs, ADMs, or other *carriage-side* provisions. It is a bedrock principle of statutory construction that a general provision does not control or create additional obligations where a specific provision already governs particular conduct.[99] Section 616 – not Section 628 – regulates MVPDs' dealings with third-party networks, as the Commission has recognized,[100] and that provision is very specific in limiting the scope of what the Commission's

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may well come when the anticompetitive concerns animating Congress's enactment of § 616(a)(3) and (5) will so effectively be eliminated or reduced as to preclude government intrusion on MVPDs' carriage decisions.").

98 *See* S. Rep. No. 101-381, at 25 (1990).

99 *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 207-08 (2010) ("There is no question . . . that '[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" (internal citations omitted)). The Commission has repeatedly recognized and applied this principle. *See, e.g.*, *Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York*, Consolidated Order, 12 FCC Rcd. 3536 ¶ 23 (1997) ("In interpreting a general provision or regulation that conflicts with a specific statutory or regulatory provision, the United States Supreme Court has stated that the general rule of statutory construction is that 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.'" (internal citations omitted)).

100 The Commission has noted the clear distinction between the programming buyer-side conduct at issue in Section 616 (affecting programmers) versus the programming seller-side conduct at issue in Section 628 (affecting competing MVPDs). *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition & Diversity in Video Programming Distribution & Carriage*, Memorandum Opinion and Order, 9 FCC Rcd. 4415 ¶¶ 24-34 (1994) ("Section 628 (containing the program access provisions) primarily restricts the activities of vertically integrated programming vendors and cable operators with respect to other, unaffiliated MVPDs. In contrast, Section 616 was designed to restrict the activities of cable operators and other MVPDs when dealing with unaffiliated programming vendors."). And the Commission has amended its implementing rules to afford standing to MVPDs (in addition to programmers) to file complaints under Section 616,

implementing rules could address. Interpreting Section 628 to cover program carriage agreements would render Section 616 nugatory, which further illustrates that the NRPM's proposed interpretation is unacceptable under customary canons of statutory construction.[101]

Even assuming for the sake of argument that the Commission did have authority to regulate carriage-side contractual provisions via Section 628, that provision ensures only that cable operators and cable-affiliated programmers do not significantly hinder or prevent other *MVPDs* from providing programming to customers.[102] Section 628 cannot be used as a means to ensure access to programming by *OVDs*.[103] Notwithstanding the NPRM's assumption, there is no evidence that ADMs or MFNs prevent other MVPDs from providing programming to their subscribers. ADM provisions do not restrict distribution by other MVPDs; rather, as discussed above, they only apply (and usually in quite limited ways) to certain types of online distribution. And although there are endless variations of MFNs (precisely because they are the product of negotiation and refinement over time), it is important to emphasize that they do not prohibit *anything*. They are a form of insurance policy – a means of assuring equal access to rates or

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but has not acted to allow any entity other than an MVPD to file complaints under Section 628. *See id.* ¶¶ 24-34; *see also Hutchens Communications, Inc. v. TCI Cablevision of Georgia, Inc.*, 9 FCC Rcd. 4849 ¶ 4 (CSB 1994) (construing a program access complaint as a program carriage complaint (which the Commission dismissed)).

101 *See NCTA v. FCC*, 567 F.3d 659, 665-66 (D.C. Cir. 2009) ("[I]n proscribing an overbroad set of practices with the statutorily identified effect, an agency might stray so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious. . . . '[W]hatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed.'" (quoting *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005))).

102 *See* 47 U.S.C. § 548(b). Cable operators (and common carriers) that own cable programming networks and provide video programming are the only class of MVPDs to which the seller-side obligations of Section 628 apply. *See id.* § 548(b), (j). Thus, it would be arbitrary and capricious to target cable operators for new restrictions when there is no evidence that cable operators affect diverse and independent programming differently than other MVPDs.

103 Two years ago, the FCC proposed to reclassify certain OVDs as MVPDs, thus extending program access rights to these OVDs. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd. 15995 (2014). This proposal was flawed both as a policy matter and a legal matter. *See* Comments of NCTA, MB Docket No. 14-261, at 18-21 (filed Mar. 3, 2015).

terms (or programming). At best, there is a tenuous connection between a programmer guaranteeing that MVPD A will receive no less favorable treatment in terms/conditions/packaging/pricing than MVPD B and MVPD B being limited in any way from providing that programming to its customers. The NPRM's theory of harm is far too speculative to support brand-new regulatory burdens pursuant to Section 628(b).[104]

V. THE PROPOSED REGULATIONS WOULD VIOLATE THE FIRST AMENDMENT.

While current marketplace dynamics call into question the justification for *any* government intervention in this area, the NPRM's proposal to interfere in negotiations between MVPDs and programmers in order to favor certain distributors of video content over others raises insurmountable First Amendment concerns.

As the Supreme Court has observed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[105] It is well settled that "cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[106] And there is no question that, like must-carry and leased access, the program carriage rules limit cable operators' and other MVPDs' editorial discretion by restricting their ability to decline to deliver certain programming networks or

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104 In addition, Comcast agrees with the conclusion in the NPRM that the Commission does not have standalone authority under Section 257. *See* NPRM ¶ 40 n.151; Comcast NOI Comments at 36-39. Section 257 is a Title II provision directed to "telecommunications services and information services," *not* Title III or Title VI video programming distribution services. *See* 47 U.S.C. § 257(a).

105 *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *see also Comcast Cable Commc'ns*, 717 F.3d at 994 (Kavanaugh, J., concurring).

106 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"). "Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* (quoting *City of Los Angeles v. Preferred Commc'ns, Inc*., 476 U.S. 488, 494 (1986)).

outlets to customers – or to carry them how they wish – and potentially penalizing them for the manner in which they choose to carry affiliated networks, or for carrying them at all.[107] Precisely because speech is always at issue in substantive regulation of the cable industry, First Amendment concerns have figured prominently in judicial decisions invalidating cable regulations.[108] For these reasons, one would expect the Commission to take First Amendment concerns seriously in considering whether it should expand the program carriage rules. Yet, incredibly, the NPRM makes only a fleeting reference to the First Amendment and fails to seek comment on what effect its proposed rules would have on MVPDs' First Amendment rights.[109]

In order to appreciate the constitutional considerations at issue, the Commission should recognize that just as an MVPD employs contractual terms such as ADMs and MFNs to protect the value of its investment in high quality programming, the New York Times is surely free under the First Amendment to decline to print an op-ed column whose value has been diminished by the author's prior publication of the column's best *bon mots* on Twitter. Likewise, the Washington Post is surely free to insist to a photojournalism service that it will pay no more to feature that service's photos than the service charges to the Houston Chronicle or the Miami Herald (or to Slate or The Daily Beast, or even to *any other* publication, if it is able to secure that

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107 *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) ("*Turner II*") ("First, the [must-carry] provisions restrain cable operators' editorial discretion in creating programming packages by 'reduc[ing] the number of channels over which [they] exercise unfettered control.'" (quoting *Turner I*, 512 U.S. at 637)); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 967-71 (D.C. Cir. 1996) (subjecting the leased access rules to intermediate scrutiny under the First Amendment).

108 *See Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner Entm't Co., L.P.*") (striking down cable horizontal ownership cap and channel occupancy rule); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (striking down revised cable horizontal ownership cap). The Commission recognized these hurdles in the *Comcast-NBCUniversal Order* when it declined to dictate the terms and conditions of how Comcast would be required to carry diverse and independent networks, in part, because it recognized that "the First Amendment . . . and Commission precedent limit [its] ability to dictate the programming policies of [its] licensees." *Comcast-NBCUniversal Order* ¶¶ 190-191. Separately, the Commission noted the "constitutional concerns raised by Commission intrusion into matters affecting the content of programming." *Id.* ¶ 162.

109 *See* NPRM ¶ 17.

guarantee). Any governmental restrictions of these behaviors would clearly impinge on the papers' First Amendment freedoms, and the same would be true of any Commission restrictions on similar ADM and MFN clauses in programming contracts.

The NPRM's proposed regulations of ADMs and MFNs in order to favor broader distribution of more "independent" and "diverse" programming at the expense of other categories of programming entail government judgments focused on the owner or the content of the programming, and therefore should be regarded as content-based and speaker-based regulation subject to strict scrutiny.[110] The NPRM's proposed regulations are sure to fail this strict standard, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[111] But even in the unlikely event that the proposed regulations were found to be *entirely content- and speaker-neutral*, the regulations would still not pass muster under intermediate scrutiny.[112] Courts uphold regulations under intermediate scrutiny only if they "advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to

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110 *See Turner I*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *id.* at 658 ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say . . . ."); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Quite apart from the purpose or effect of regulating content, . . . the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) ("*Bennett*") (invalidating a state subsidy that benefitted a certain class of speaker at the expense of another).

111 *Bennett*, 564 U.S. at 734.

112 Economic or behavioral regulation of programming contracts, if entirely content- and speaker-neutral, is subject to intermediate scrutiny. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 710-11 (D.C. Cir. 2011) ("*Cablevision*") (evaluating the order closing the program access rules' so-called "terrestrial loophole" under intermediate scrutiny and holding that "[u]nder that standard, we will sustain a regulation if 'it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'" (quoting *Turner I*, 512 U.S. at 662)).

further those interests."[113] Although the Commission has suggested that further increasing the availability of independent and diverse programming is an important governmental interest, and that regulation of ADMs and MFNs is narrowly targeted to address obstacles to such availability, *both* of those propositions are suspect under First Amendment precedent, especially in the current video marketplace.

When the government asserts an important interest in redressing past harms or preventing anticipated harms, "it must do more than simply 'posit the existence of the disease sought to be cured.'"[114] Rather, "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms *in a direct and material way*."[115] And it would be unreasonable to conclude that the regulation of MFN and ADM provisions will have any effect on (or is narrowly tailored to address) diverse and independent programming. As detailed in Section II, there is no demonstrated lack of independent or diverse programming today or lack of outlets for the distribution of that programming. As the D.C. Circuit has observed, there is "overwhelming evidence concerning the dynamic nature of 'the communications marketplace,' and the entry of new competitors at both the programming and the distribution levels"[116] and "[t]he video programming industry . . . look[s] very different today than it did when Congress passed the Cable Act in 1992."[117] And these statements *preceded* the

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113 *See Time Warner Entm't Co., L.P.*, 240 F.3d at 1130 (quoting *Turner II*, 520 U.S. at 180).

114 *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

115 *Id.* (emphasis added).

116 *See, e.g.*, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (citation omitted).

117 *Cablevision*, 649 F.3d at 711; *see also Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1313-14 (D.C. Cir. 2010) ("It is true that the MVPD market has transformed substantially since the Cable Act was enacted in 1992."); *Time Warner Cable Inc.*, 729 F.3d at 161 ("[T]he video programming industry has changed significantly over the last two decades: cable operators' share of the MVPD market has declined due to increased competition from DBS providers and telephone companies, OVDs are an increasingly available alternative to MVPDs, and vertical integration between cable operators and programming networks has decreased. These circumstances strongly suggest an industry trending toward more rather than less competition."); *Comcast Cable Commc'ns*, 717 F.3d at

spectacular growth of online video distribution, which has vastly increased the amount and variety of independent programming and dramatically reduced the barriers between program creators and consumers.[118] In today's marketplace, unfettered access to the Internet allows anyone with a creative idea and a Kickstarter account to launch a new programming service, which in turn can capture the attention of myriad platforms and lead to broader distribution.[119]

Given the continued growth of independent programming with limited government intervention, it is difficult to see how any additional regulation of program carriage agreements could result in a material increase in the availability and diversity of such supply. As the D.C. Circuit has recognized, "at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest."[120] There is no credible evidence in the record that regulation of ADM and MFN provisions is likely to increase the carriage or supply of independent and diverse programming. As discussed above, MVPDs are under no obligation to carry cable networks at all; thus, restricting specific contractual provisions which programmers bargain for and which may make distribution of independent and diverse programming actually *more* attractive to an MVPD is likely to *diminish* the likelihood that MVPDs will carry such programming. It is essential that the Commission recognize the vast

994 (Kavanaugh, J., concurring) ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market.").

118 Of course, the Commission itself is mandated by Congress to report annually on the state of the video marketplace. *See* 47 U.S.C. § 548(g). Those reports may be an appropriate place for the Commission to assess the state of diverse and independent programming and raise concerns should they arise.

119 *See supra* Section II.

120 *Time Warner Entm't Co., L.P.*, 240 F.3d at 1135; *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250, 254-55 (1974) (rejecting the argument that governmental interference with newspaper editorial decision-making was justified by "a homogeneity of editorial opinion, commentary, and interpretive analysis" resulting from what the proponents of government intervention viewed as excessive concentration in media ownership, and ruling that such a perceived lack of diversity could not justify mandatory rights of response).

marketplace changes that have obviated the need for government intervention and place the First Amendment at the forefront of any further deliberations regarding program carriage regulations.

VI. THE CONCERNS RAISED ABOUT BUNDLING ARE WITHOUT MERIT.

The NPRM also raises questions about how wholesale bundling may affect independent programmers.[121] As discussed in our comments in response to the NOI,[122] the widespread industry practice of offering bundles of programming networks for a discounted price has important pro-competitive benefits, including efficiency of contracting and greater overall output that enhances consumer welfare.[123] Bundling has helped foster the enormous range of diverse, high-quality content currently available, and certainly does not justify any sort of regulatory intervention for the sake of programming diversity.

Wholesale bundling of programming networks can create opportunities for valuable content – including diverse content that may not otherwise have an opportunity to fully flourish – to be carried. Including new, untested programming with special appeal to diverse audiences in programming bundles may encourage viewers to sample that programming, which in turn can help to grow the audience for such programming. Numerous diversity and civil rights organizations have explained that wholesale bundling ensures that niche, minority, or otherwise underserved audiences receive the programming they want and need.[124]

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121 *See* NPRM ¶ 33.

122 *See Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610 (2016).

123 *See* Comcast NOI Comments at 32-35; *see also* Tasneem Chipty, Managing Principal, Analysis Group, Workshop on the State of the Video Marketplace at 125:20 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("Carriage agreements in the industry are heavily negotiated. . . . Bundling can be efficient for the firm. Bundling can be convenient for consumers . . . . There are lots of pro-competitive reasons for why you might see wholesale bundling and if you are going to take this seriously and regulate or perhaps run an inquiry, you should take each of these [into account].").

124 *See* Letter from Asian Americans Advancing Justice, et al., to Marlene Dortch, Secretary, FCC, MB Docket No. 16-41, at 2 (filed Sept. 20, 2016) (arguing that restricting bundling would "result in less diverse programming

Moreover, the record in the NOI proceeding and other proceedings demonstrates that, even for large, established programmers, all of the networks in their portfolios do not have uniform carriage.[125] Far from it. Notably, for example, the fact that NBCUniversal does not (and cannot) "force" all MVPDs to carry all its networks, much less at maximal distribution, is demonstrated by the wide range of subscriber numbers for various NBCUniversal networks.[126] At the same time, many networks that are not part of large media companies have gained even wider distribution than those of major programmers, such as INSP (80.7 million households) and BabyFirst Americas (51.5 million households).[127] Of course, it goes without saying that, as a natural consequence of free market capitalism at work, many networks that launched and grew as independent networks have been acquired by larger media companies because of their demonstrated value. The fact that a network is owned by a larger media company is *not* indicative of a lack of diverse or independent viewpoints or content.

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for consumers across the board" and "could lead to such narrow targeting of programming that it would make it harder [for] Asian American and Pacific Islander programmers to expand their already limited footprint into other markets"); Letter from Ebonie Riley, D.C. Bureau Chief, National Action Network, to Marlene Dortch, Secretary, FCC, MB Docket No. 16-41, at 1 (filed Sept. 19, 2016) (arguing that ACA's proposal to restrict bundling "would allow MVPDs to draw a bright red line around those channels identified as urban, and prevent viewers in rural areas from accessing urban interest content"); Letter from Dr. E. Faye Williams, Esq., National Chair, National Congress of Black Women, et al., to Kevin Martin, Chairman, FCC, et al., MB Docket No. 07-42, at 1 (filed May 29, 2008) (detailing how bundling of networks leads to "increase[ed] . . . availability of programming targeting minority communities" and "increased investment in programming which yields a higher quality product.")

[125] *See* Letter from Susan Fox, Vice President, Walt Disney Co., to Marlene Dortch, Secretary, FCC, MB Docket No. 16-41, at Attachment (filed Aug. 3, 2016); *see also* SNL Kagan, *TV Network Summary*, https://www.snl.com/interactivex/tv_NetworksSummary.aspx (last visited Dec. 12, 2016).

[126] *See* SNL Kagan, *TV Network Summary*, https://www.snl.com/interactivex/tv_NetworksSummary.aspx (last visited Dec. 12, 2016). NBCUniversal networks are not carried by every MVPD, nor are all of them carried on the most widely penetrated tier, as evidenced by the wide range of subscriber numbers for various NBCUniversal networks (for example, USA Network has 93.1 million households; Syfy has 90.7 million; CNBC World has 43.7 million; Chiller has 37.3 million; and Cloo has 23.8 million) (all 2016 numbers).

[127] *See id.* (2016 numbers).

VII. CONCLUSION

Given the competitiveness of the video marketplace, the lack of a statutory basis of authority, the encroachment on First Amendment rights that comes with any government oversight of program carriage decision-making, and the lack of marketplace evidence of any harm, expanding Commission regulation of private negotiations in order to promote additional carriage of "independent" programming would be arbitrary and capricious, contrary to law, and unconstitutional. For the foregoing reasons, the Commission should decline to adopt the regulations proposed in the NPRM, and terminate the proceeding.

Respectfully submitted,

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January 26, 2017